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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. _____

77-822

In the Matter of the Application of
JOHN LANE, JR.,
Appellant,
for a Judgment Under Article 78 of
the Civil Practice Law and Rules, etc.

v.

NORMAN F. GALLMAN, President, et al.,
constituting the STATE TAX COMMISSION OF
THE STATE OF NEW YORK,
Respondents

On Appeal From the Court of Appeals
of the State of New York

JURISDICTIONAL STATEMENT

DECEMBER 1977

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On Appeal From the Court of Appeals
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JURISDICTIONAL STATEMENT

Appellant appeals from the final
order of the Court of Appeals of the
State of New York, dated and entered
April 28, 1977, dismissing appellant's
appeal sua sponte. The finality of said
order was deferred by an Order To Show

Cause Containing Temporary Stay, signed by Judge Jacob D. Fuchsberg of that court on July 26, 1977, as more specifically shown below.

Appellant requests remand to the New York Court of Appeals for full consideration of the constitutional issues of this case (summarily dismissed by it) in light of United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1961), as applied by the U.S. Court of Appeals for the D.C. Circuit in District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir.), cert. denied, 386 U.S. 1034 (1967)--a case indistinguishable from the one at bar, and allowed to stand by this Court. If remand is inappropriate, then this Court should proceed to hear and decide the merits.

OPINIONS BELOW

The State Tax Commission's decision is not reported. It is set forth in Appendix A, infra.

Appellant's petition for redetermination was initially filed in the New York Supreme Court, Albany County, which transferred the matter, without opinion, to the Appellate Division of the Supreme Court for initial disposition pursuant to Section 7804(b) of the Civil Practice Law and Rules.

The memorandum decision of the Appellate Division is reported at 49 App. Div. 2d 963, 373 N.Y.S.2d 700. It is set forth in Appendix B, infra.

Appellant's motion to the Appellate Division for leave to appeal to the New York Court of Appeals, dated December 1, 1975, was denied without opinion on

March 25, 1976, 38 N.Y.2d 711, 348 N.E.2d 619, 384 N.Y.S.2d 1025.

On appeal as of right, the New York Court of Appeals rendered no opinion. Its unreported order of April 28, 1977, dismissing the appeal sua sponte, without opinion, with the statement that "no constitutional question is directly involved," is set forth in Appendix C, infra. (The fact of dismissal is listed in 42 N.Y.2d 823, 364 N.E.2d 1353, 396 N.Y.S.2d ____ (Adv. Sheet No. 4, Aug. 23, 1977, at CVIII).) Its subsequent Order To Show Cause Containing Temporary Stay (unreported), signed July 26, 1977, and entered July 28, 1977, is set forth in Appendix D, infra. The motion made by order to show cause, for vacation or stay of the dismissal and for oral argument, was subsequently denied by order entered September 9, 1977, without opinion,

unreported, set forth in Appendix E, infra.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(1) This is a proceeding brought by appellant under Article 78 of the New York Civil Practice Law and Rules to review a decision of the State Tax Commission that as a matter of law (there being no dispute as to the facts) appellant was taxable on income earned out-of-state during the last ten months of 1965, after he had admittedly abandoned his only New York abode (his parents' home) and was no longer in fact a resident of the state, and was thus no longer subject to the tax imposed by law on every resident of the state (including out-of-state income) but only subject to the tax im-

posed on nonresidents of the state (limited to New York income).

(ii) The judgment or decree sought to be reviewed is the order of the New York Court of Appeals, dated and entered April 28, 1977, dismissing the appeal sua sponte (Appendix C, infra).

Since there was no hearing, no petition for rehearing was filed. Rather, by timely Order To Show Cause Containing Temporary Stay (Appendix D, infra), signed July 26, 1977 (within the time otherwise allowed for a petition for rehearing), and entered July 28, 1977, appellant moved the same court for an order vacating or staying the sua sponte dismissal and adhering to its prior determination that "this appeal will continue in its normal course and the Court will not act sua sponte."

(A copy of the Order To Show Cause,

with the Petition therefor showing (i) the Court of Appeals' retraction of its prior determination not to dismiss sua sponte, and (ii) three serious misstatements of fact by respondents in their brief to the Court of Appeals on the merits, was forwarded to this Court under letter of July 27, 1977, for information re the extension of time to docket theretofore granted (No. A-53).)

The Order To Show Cause stayed the operation and effect of the dismissal order "until ten days after the service upon counsel for Appellant of an order determining this application." (The temporary stay was expressly sought in order to preserve appellant's right of appeal to this Court pending decision on the motion.)

The motion to allow the appeal to continue to oral argument was denied by

order dated and entered September 9, 1977. As of December 5, 1977, a copy of said order had not been served upon appellant by either the Court of Appeals or respondents. The order was dictated to appellant by the court clerk's office on December 6, 1977, and appellant understands he was finally served by respondents by mailing on that date.

Notices of appeal were filed on December 6, 1977, in the New York Court of Appeals and in the Appellate Division, Third Department, of the New York Supreme Court, since appellant is uncertain which of those courts is possessed of the record. They are set forth in Appendix F, infra.

(iii) Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(2), this being an appeal which draws into question the validity of New York

Tax Law Secs. 605(a)(1) and 654 on the grounds that, (1) as construed by the New York courts, they are repugnant to the Constitution of the United States, and (2) the decisions of the New York courts upholding the statute constitute ad hoc adjudication in violation of the Constitution of the United States.

(iv) Cases sustaining the jurisdiction of this Court are:

Lawrence v. State Tax Com-

mission, 286 U.S. 276,

282-83 (1932)

Chicago G.W.R. Co. v. Basham,

249 U.S. 164 (1919)

United States v. Healy, 376

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(1925)

CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED

I. Fourteenth Amendment to United
States Constitution

The Fourteenth Amendment to the
United States Constitution provides in
pertinent part:

Section 1. * * * nor shall any
State deprive any person of
life, liberty or property,
without due process of law;
nor deny to any person within
its jurisdiction the equal
protection of the laws.

II. New York Tax Law Sec. 605

Section 605 of the New York Tax Law
provided in pertinent part (at all times
here pertinent):

Sec. 605. Resident and non-
resident defined

(a) Resident individual. A
resident individual means an
individual:

(1) who is domiciled in
this state, unless he main-
tains no permanent place of
abode in this state, maintains

a permanent place of abode
elsewhere, and spends in the
aggregate not more than thirty
days of the taxable year in
this state, or

(2) who is not domiciled
in this state but maintains a
permanent place of abode in
this state and spends in the
aggregate more than one hundred
eighty-three days of the tax-
able year in this state, unless
such individual is in the armed
forces of the United States
during an induction period.

(b) Nonresident individual.
A nonresident individual means
an individual who is not a
resident.

* * *

[Omitted subdivisions re-
late only to estates or
trusts]

(e) Cross reference. For
effect of change of an individ-
ual's resident status, see sec-
tion six hundred fifty-four.

N.Y. Tax Law Sec. 605, McKinney's Bk. 59,
2nd Vol., at 272-73 (1975).

III. New York Tax Law Sec. 654

Section 654 of the New York Tax Law

provided in pertinent part (at all times here pertinent):

Section 654.

(a) General. If an individual changes his status during his taxable year from resident to nonresident, or from nonresident to resident, he shall file one return as a resident for the portion of the year during which he is a resident, and one return as a nonresident for the portion of the year during which he is a nonresident, subject to such exceptions as the tax commission may prescribe by regulation.

N.Y. Tax Law Sec. 654(a), McKinney's Bk. 59, 2nd Vol., at 339 (1975).

QUESTIONS PRESENTED

1. Whether New York State has jurisdiction, constitutionally, to tax appellant's income earned out-of-state during the last ten months of 1965, after he had admittedly permanently abandoned his only New York abode (his parents'

home) and was no longer in fact a resident of the state, did not own property in the state, no longer enjoyed benefits in the state, and was a de facto resident of another state.

2. Whether a state may constitutionally make ad hoc, discriminatory application of its income tax laws in order to maximize the tax, by reaching precisely opposite conclusions as to the legal effect of the identical statutory provisions in two cases upon facts identical (so far as relevant), and even citing the first to support the second, opposite result.

3. Whether this case should be remanded to the New York Court of Appeals for full consideration of the constitutional issues of this case (summarily dismissed by it) in light of United States v. Jin Fuey Moy, 241 U.S. 394, 401

(1961), as applied by the U.S. Court of Appeals for the D.C. Circuit in District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir.), cert. denied, 386 U.S. 1034 (1967) --a case indistinguishable from the one at bar and allowed to stand by this Court.

STATEMENT OF THE CASE

I. Facts

Appellant agrees with the following findings of fact in the respondents' decision:

2. Until March 1, 1965, petitioner resided with his parents in Yonkers, New York. He finished law school in June, 1964, and worked for a New York City law firm until February, 1965. He applied for a direct commission into the Air Force Reserve and received a commission in January, 1965.

3. On March 1, 1965, petitioner reported to his duty station at the office of the General Counsel, United States Air Force, Pentagon Building, Washington, D.C. From

March until November, 1965, he rented an apartment in Arlington, Virginia under a six month lease. He then moved to another rented apartment in Alexandria, Virginia which he held under a yearly lease and which he kept until 1967. Both apartments were chosen so as to be suitable after petitioner's planned marriage in September, 1965.

4. Petitioner spent more than 30 days in New York State between January 1, 1965, and February 28, 1965. He spent no time in New York State between March 1, 1965, and December 31, 1965.

5. The deficiency amounts to \$50.75 including interest. The refund claimed is for withholding tax in the amount of \$35.20.

It is not questioned, and the record establishes, that appellant has never resided in New York after March 1, 1965, and has never at any time ever had an interest, whether ownership or rental or otherwise, in any place of abode in the State of New York.

Accordingly, since true domicile for tax purposes necessarily imports

residence, appellant as a matter of law could not be domiciled in New York within the meaning of the Tax Law after March 1, 1965. Therefore, respondents' only other purported finding of fact--that "1. Petitioner was during 1965 and prior years, a domiciliary of New York State"--was a conclusion of law, constitutionally erroneous under the Due Process Clause (as shown infra), and (as also shown infra) directly inconsistent with its own and the Appellate Division's conclusion in Kritzik v. Gallman, where it was held: "When petitioners moved to Connecticut in July, they no longer maintained a permanent place of abode in New York. They could not, therefore, meet the statutory requirements for residents." 41 App. Div. 2d 994, 344 N.Y.S.2d 107 (1973).

It is also unquestioned that after March 1, 1965, appellant did not actually

enjoy any benefits in New York and was not legally entitled to benefits concomitant with living or working there.

II. When and How the Federal Questions Were Raised and Decided Below

In its brief in the Appellate Division (p. 9) the Tax Commission opened its defense of the tax under attack by going on the offense, and the spearhead of the offense was the proposition that the constitutionality of the tax in issue had been upheld by the United States Supreme Court, viz.:

ARGUMENT

THE PETITIONER WAS SUBJECT TO NEW YORK STATE INCOME TAX AS A RESIDENT OF NEW YORK STATE FOR THE ENTIRE YEAR 1965 UNDER THE PROVISIONS OF TAX LAW, SEC. 605.

The United States Supreme Court has upheld the right of a state to tax a person domiciled therein on income derived from outside sources (Lawrence v. State Tax

Commission, 286 U.S. 276 (1932);
People ex rel. Cohn v. Graves, 300
U.S. 308 (1937)).

The petitioner readily admits that he was domiciled in New York State during the entire year of 1965 and that he spent more than 30 days in New York State from January 1, 1965 to March 1, 1965. It is submitted that these facts alone subject him to New York State income tax as a resident for the entire year under the provisions of Tax Law, Sec. 605(a)(1).

In the first sentence of text above, respondent effectively introduced into this case in the Appellate Division the question of the constitutionality of the tax in issue, specifically, the question of the state's jurisdiction to tax under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The undersigned attorney for the appellant herein upon argument informed the Appellate Division in substance of the constitutional question involved in

taxing a nonresident (before entering or after leaving a state) upon income earned outside the taxing state; referred the court to the latest authoritative case, District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir.), cert. denied, 386 U.S. 1034 (1967), wherein the tax had been on income earned by a nonresident before taking up residence in the District; that the tax had been held unconstitutional, and the unconstitutionality reversed, but the tax nullified by construing the statute as not intended to tax the income in question, per United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1961).

In addition, counsel mentioned an issue of the Iowa Law Review (Vol. XXII, No. 2, 1937) containing a symposium of eight articles on state income taxation, a copy of which had been procured for the convenience of the court.

Appellant's argument time (15 minutes) was inadequate to the task, and counsel addressed a letter after argument to Honorable Michael E. Sweeney, the Justice who presided on the day of argument, to identify properly a number of items which had been referred to, particularly the citation to District of Columbia v. Davis, supra, in the fifth paragraph of the letter as the case cited to the court on argument. A copy of said letter was sent at the same time to respondents, who did not object in any respect to its accuracy or consideration by the court. The letter is attached as Appendix G, infra. (Appellant understands that the oral argument to the court was not recorded.)

It should be noted that the hearing, i.e., argument, before the Appellate Division was the first before any court.

The matter had been transferred to the Appellate Division from the Supreme Court, Albany County.)

Unconstitutionality under the Due Process Clause was also urged in the motion to the Appellate Division for reargument or leave to appeal, and in the motion to the Court of Appeals for leave to appeal, both without objection from opposing counsel. It was further urged in appellant's brief in its appeal as of right thereafter taken to the Court of Appeals, whereupon respondents for the first time alleged that the issue had not been raised below. A copy of the letter to Justice Sweeney, referred to above, appeared at page 72 of the Record on Appeal to the Court of Appeals.

Regarding the equal protection violation, appellant asserted unconstitutional ad hoc application of the tax law

by the Appellate Division as violating the Equal Protection Clause in its brief in its appeal as of right to the Court of Appeals. It is evident that this question could not have been urged in the Appellate Division before its decision was issued which constituted the equal protection violation.

The Appellate Division's memorandum decision and denial of reargument and leave to appeal made no reference whatever to the constitutional question raised by appellant.

The Court of Appeals' order dismissing sua sponte the appeal taken as of right stated that "no constitutional question is directly involved," thereby ruling against appellant on the merits of the constitutional questions but without discussion--and also without hearing oral argument, even though, in reliance upon

that court's prior jurisdictional determination that the matter would proceed to argument, appellant had proceeded with full briefing of the constitutional questions.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. The Due Process Question

The first issue in this case is whether appellant's out-of-state income earned during that portion of the taxable year after appellant had permanently terminated residence in the state is, and may constitutionally be, taxable under the New York Tax Law. Respondents and the New York courts have construed the Tax Law as imposing a tax on such income.

The foregoing construction presents a grave constitutional question.

It is fundamental that the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from taxing beyond its territorial jurisdiction. Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954).

The constitutional basis for state taxing jurisdiction is actual enjoyment of benefits in the state, or legal entitlement to benefits while living or working there. Shaffer v. Carter, 252 U.S. 37, 50-53, 57 (1920); Lawrence v. State Tax Commission, 286 U.S. 276, 279-80 (1932); People ex rel. Cohn v. Graves, 300 U.S. 308, 313 (1937); Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940); Miller Bros. Co. v. Maryland, supra, 347 U.S. at 344-45; cf. American Commuters Association v. Levitt, 405 F.2d 1148, 1152-53 (2d Cir. 1969). Also necessary is power to enforce the tax. Shaffer

v. Carter, supra, 252 U.S. at 49.

Thus a resident of a state, because personally actually within the jurisdiction of the state and enjoying benefits there, is taxable on all income, in-state and out-of-state. Lawrence v. State Tax Commission, supra; People ex rel. Cohn v. Graves, supra. And a nonresident--because the state has only in rem jurisdiction and not personal jurisdiction over him--is subject to tax only to the extent he owns property in the state or carries on a business, trade, or profession in the state. Shaffer v. Carter, supra, 252 U.S. at 53, 57.

Under facts virtually identical in all material respects to the present case, one court has squarely held a tax such as that here in issue to be unconstitutional, Davis v. District of Columbia, Docket No. 1969, D.C. Tax Court, Opinion Filed

December 22, 1965, at 12 (Appendix H, infra), modified on appeal, 371 F.2d 964 (D.C. Cir., cert. denied, 386 U.S. 1034 (1967)); the highest court of one state has held in an advisory opinion that such a tax would be invalid, In re Opinion of the Justices, 88 N.H. 500, 190 Atl.801, 806 (1937); the U.S. Court of Appeals for the D.C. Circuit and the highest courts of four states have held that such a tax presents grave constitutional questions and have construed the tax statutes in issue so as to avoid deciding those questions. District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir.), cert. denied, 386 U.S. 1034 (1967); Kennedy v. Commissioner, 256 Mass. 426, 152 N.E. 747 (1926); Greene v. Wisconsin Tax Commission, 221 Wis. 531, 266 N.W. 270 (1936); Martin v. Gage, 281 Ky. 95, 134 S.W.2d 966 (1939); Forester v. Culpepper, 194 Ga.

744, 22 S.E.2d 595 (1942). Indeed, the D. C. Circuit in Davis, supra, regarded the New York statute here in issue as a clear example of one which did not purport to tax out-of-state income in the nonresident portion of the taxable year, before the taxpayer moved into or after he left the state. 371 F.2d at 967-68 & n. 2.

We have come across no case in any jurisdiction wherein an effort was made to impose an income tax upon income of the character and under the circumstances of the case at bar. The only reported case apparently not in accord is Wood v. Tawes, 181 Md. 155, 28 A.2d 850 (1942), cert. denied, 318 U.S. 788 (1943). The value of Wood is depreciated by the Maryland Legislature's later amendment of its tax statute expressly to avoid taxing out-of-state income earned during the

nonresident period in the year of a residence change into or out of the state. Maryland Code Art. 81, Sec. 279(1), as amended by 1959 Laws, Ch. 482. Moreover, the D.C. Tax Court and the D.C. Circuit did not follow the Wood case in Davis even though it was relied upon by the D.C. Government.

The case at bar is one of first impression for this Court.

II. The Equal Protection Question

Appellant's primary argument to the New York courts was for construction of the Tax Law to avoid the serious due process question in I above. Oddly enough, the most direct support for appellant's construction of the Tax Law was the very decision of the Appellate Division which that court cited to support its finding for respondents in this case.

In Kritzik v. Gallman, 41 App. Div. 2d 994, 344 N.Y.S.2d 107 (1973), a taxpayer who would have benefited from being considered a resident for the entire taxable year was denied resident status and taxed as a nonresident for the period after he terminated residence in the state. There was no basis whatever in the stipulated facts or elsewhere in the record of that case for a finding of a change of domicile, and the Appellate Division made no mention of a change of domicile. The decision turned entirely on the absence of a place of residence in the state.

The Tax Commission's brief in that case urged, and the Appellate Division adopted, precisely the construction of the Tax Law that this appellant urged upon that court in this case. The Commission argued in that case:

However, it is obvious that the provisions of section 605 do not relate to individuals who have changed residence status during the year as section 654 makes particular provision for change of residence status.

Since petitioners did change residence status during 1967, section 605 does not apply, and it is clear that petitioners were nonresidents for the part of the year 1967 from July 27 to December 31.

The Appellate Division held:

Initially, we find no merit to the contention that petitioners were residents for the entire year of 1967 based on paragraph (2) of subdivision (a) of section 605 of the Tax Law. Section 654 of such law is clearly applicable where, as here, there is a change of status during the tax year from resident to nonresident. When petitioners moved to Connecticut in July, they no longer maintained a permanent place of abode in New York. They could not, therefore, meet the statutory requirements for residents. (Tax Law, Sec. 605, subd (a)(2)./Emphasis added./

Appellant sought precisely that

result in this case--to be treated as a nonresident after March 1, 1965, because of the absence of actual residence and of a permanent place of residence in the state. Yet the respondents and the Appellate Division refused appellant here the benefit of that holding. This inconsistent, ad hoc application of the split-year provision of the Tax Law, sustained by the New York Court of Appeals, appears to deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. That Amendment requires that all persons in the same class be accorded equality of treatment in the imposition of state taxes, and that any differences in treatment of different persons "rest on real and not feigned differences." Walters v. City of St. Louis, 374 U.S. 231, 237 (1954)(and authorities cited).

CONCLUSION

Appellant urges that the New York Tax Law is unconstitutional insofar as it has been construed by the New York courts to tax appellant's income earned outside the state during the ten months in 1965 after he became a nonresident.

Nevertheless, appellant would still prefer, as from the beginning, to have the Tax Law construed as not purporting to tax appellant's income after he became a nonresident. There is extensive legislative history, fully presented by appellant to the New York courts but completely ignored by them and by respondents, demonstrating that the Legislature did not intend the result reached by the courts, but rather intended to tax persons as residents (i.e., on out-of-state income) only for the period they

actually are residents.

Understanding that this Court does not ordinarily review a state's construction of its own statute, appellant nevertheless does not seek a conclusive constitutional determination by this Court at this time, unless it is deemed unavoidable. The most satisfactory resolution for all concerned at this time would be for this Court to reverse on the ground that there are serious constitutional questions not adequately considered by the New York courts, and remand to the New York Court of Appeals for full consideration thereof in the light of United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1961), which requires construction to avoid grave constitutional questions. The latest and most authoritative application of that doctrine in a pertinent case is District of Columbia v. Davis,

371 F.2d 964 (D.C. Cir.), cert. denied,
386 U.S. 1034 (1967), which is virtually
on all fours and should be considered
controlling here.

Appellant is convinced that upon full
and fair consideration, the New York
Court of Appeals could not avoid uphold-
ing appellant's construction of the Tax
Law.

RESPECTFULLY SUBMITTED,

JOHN LANE
JOHN LANE, JR.

Attorneys for Appellant

December 1977

APPENDIX

Decision of State Tax Commission.STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

JOHN LANE, JR.

for a Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law
for the Year 1965.

John Lane, Jr. filed a petition under section 689 of the Tax Law for the redetermination of a deficiency and for refunds in personal income tax under Article 22 of the Tax Law for the year 1965. In lieu of a hearing, the petitioner, without counsel, and the Income Tax Bureau, by Edward H. Best, Esq. (Francis X. Boylan, Esq., of Counsel), have submitted the file pertaining to the deficiency to the State Tax Commission. Said file has been duly examined and considered.

ISSUE

The issue in this case is whether a domiciliary of this State who changed his abode during 1965 is a resident for the entire year or whether he can be considered a nonresident for part of the year under section 605 of the Tax Law, and thus entitled to file a nonresident return for part of the year under section 654 of the Tax Law.

FINDINGS OF FACT

1. Petitioner was, during 1965 and prior years, a domiciliary of New York State.

Decision of State Tax Commission.

2. Until March 1, 1965, petitioner resided with his parents in Yonkers, New York. He finished law school in June, 1964, and worked for a New York City law firm until February, 1965. He applied for a direct commission into the Air Force Reserve and received a commission in January, 1965.

3. On March 1, 1965, petitioner reported to his duty station at the office of the General Counsel, United States Air Force, Pentagon Building, Washington, D.C. From March until November, 1965 he rented an apartment in Arlington, Virginia under a six month lease. He then moved to another rented apartment in Alexandria, Virginia which he held under a yearly lease and which he kept until 1967. Both apartments were chosen so as to be suitable after petitioner's planned marriage in September, 1965.

4. Petitioner spent more than 30 days in New York State between January 1, 1965, and February 28, 1965. He spent no time in New York State between March 1, 1965, and December 31, 1965.

5. The deficiency amounts to \$50.75 including interest. The refund claimed is for withholding tax in the amount of \$35.20.

CONCLUSIONS OF LAW

Petitioner was a New York resident, as defined in section 605 of the Tax Law, for the entire year 1965 and was not entitled to file a return for part of 1965 under section 654 of the Tax Law as a nonresident. Petitioner did not change his domicile during 1965. Furthermore, he remained a New York resident since he had no place of abode outside of New York for the entire year 1965, and he did maintain a place of abode in New York for

Decision of State Tax Commission.

part of such year. We must reject petitioner's argument that he satisfied the conditions of section 605(a)(1) when only the latter part of 1965 is considered and that therefore he should be considered a nonresident for that part of the year. The acquisition of a new place of abode or the abandonment of an old place of abode during a taxable year does not cause a change in residence during such taxable year.

The provisions defining residence in terms of permanent place of abode were added to the income tax law (see section 350 subdivision 7 of Article 16 of the Tax Law, the predecessor of section 605) by Chapter 425 of the Laws of 1922 to affect only those individuals who continuously from year to year claim a domicile in one state but actually maintain a home in another state with some degree of permanence. These provisions have been interpreted to mean that the requisite permanent place of abode must exist for the entire taxable year.

The further provisions added by chapter 462 of the Laws of 1934 relating to New York domiciliaries and imposing the dual requirement that a domiciliary maintain no permanent place of abode in New York and maintain a permanent place of abode outside of New York have been interpreted to impose two separate requirements relating to a permanent place of abode each of which must be met for the entire taxable year in question and neither of which has been met by this petitioner. The provisions of section 654 of the Tax Law relating to two returns thus apply only where there is a change in residence by reason of a change of domicile during the taxable year. These provisions have never been held to apply where there is only an acquisition or abandonment of a place of abode even though they were added to the predecessor of section 654 (section 367-a of Article 16 of the Tax Law) by the same law (chapter 425 of the Laws of 1922), that de-

Decision of State Tax Commission.

finer residence in terms of a permanent place of abode. This construction of the law has been upheld by the courts in *People ex rel. Mackell v. Bates*, 278 App. Div. 724.

DECISION

The petition is denied. The refunds are denied. The deficiencies are affirmed together with such interest, if any, as may be due under section 684 of the Tax Law.

Dated: Albany, New York, March 16, 1972.

STATE TAX COMMISSION

/s/ NORMAN F. GALLMAN
Commissioner

/s/ A. BRUCE MANLEY
Commissioner

/s/ MILTON KOERNER
Commissioner

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APPENDIX B

MEMORANDUM DECISION OF THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE NEW YORK SUPREME COURT (No. 25356, dated October 23, 1975)

(Captions omitted)

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court at Special Term, entered in Albany County) to review a determination of the State Tax Commission which denied petitioner's application for a redetermination of a deficiency and for a refund in personal income tax for the year 1965.

Individuals subject to the New York personal income tax are classified as either residents or nonresidents as those terms are defined by Section 605 of the Tax Law. Section 654 of the Tax Law governs those situations in which an individual's status as a resident or a nonresident changes during his taxable

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year. Claiming that his former resident status had changed during 1965, petitioner invoked section 654 and computed his tax liability for that year under its provisions. The Tax Commission disagreed, determining that a higher tax amount was due from him as a resident, and this proceeding ensued when petitioner's application for a redetermination of a deficiency and claim for a refund was denied.

The facts are undisputed. Petitioner remained a New York domiciliary throughout the tax year in question although he left his former permanent abode in Yonkers on March 1, 1965 when he entered military service. For the balance of that year he maintained a permanent abode at different locations in the State of Virginia and did not return to New York. Sometime after 1965 he

abandoned his domicile in this jurisdiction.

Insofar as it relates to this case, a resident individual is defined as one " * * * who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state" (Tax Law, Sec. 605, subd. [a], par. [1]). Petitioner insists that since he met the conditions of exception after March 1, 1965, his status had changed to that of a nonresident during the tax year. The Tax Commission, on the other hand, interprets the conditions of exception as applying to an entire taxable year and concludes that, when so measured, petitioner failed to remove himself from the resident classification during 1965

because he maintained a permanent abode and spent more than 30 days in this State. Under this construction, as petitioner correctly observes, it would be impossible for him to effect a change in his resident status during any taxable year without making a corresponding change in his domicile. However, merely because section 654 of the Tax Law contains a procedure to be followed when a change in status occurs during a tax year, it does not necessarily follow that such a change is thereby authorized or made possible in every circumstance. We cannot say that the Tax Commission's interpretation of these provisions is irrational or unreasonable since it is entirely consistent with prior case law on related topics (Matter of Kritzik v. Gallman, 41 A D 2d 994; People ex rel. Mackall v. Bates, 278 App. Div. 724;

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Matter of Rothfeld v. Graves, 264 App. Div. 54, affd. 289 N.Y. 583). Accordingly, its construction must be upheld (cf Matter of Howard v. Wyman, 28 N Y 2d 434, 438).

Determination confirmed, and petition dismissed, without costs.

SWEENEY, J. P., KANE, KOREMAN, MAIN and LARKIN, JJ., concur.

C-1

ORDER OF NEW YORK COURT OF APPEALS DISMISSING APPEAL SUA SPONTE (3 Mo. No. 424 SSD 39, dated April 28, 1977)

(Captions omitted)

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

S/ Joseph W. Bellacosa

Joseph W. Bellacosa

Clerk of the Court

D-1

NEW YORK COURT OF APPEALS--ORDER TO SHOW CAUSE CONTAINING TEMPORARY STAY (Clerk's File No. 601; Index No. 7478-73; dated July 26, 1977, entered July 28, 1977)

(Captions omitted)

Upon the annexed Petition of Appellant herein by his attorney, John Lane, Esq., verified the 24th day of July, 1977, and upon all papers filed and proceedings heretofore had herein and due deliberation having been had, it is

ORDERED, that the Respondents herein, constituting the State Tax Commission of the State of New York, show cause before this Court at a session thereof to be held at Court of Appeals Hall in the City of Albany, on the 29th day of August, 1977, at 10 o'clock, a.m. on that day, why this Court should not vacate, or stay the operation and effect of, its Order entered herein April 28,

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1977, dismissing sua sponte the appeal then pending herein fully briefed and adhere to its prior determination of July 16, 1976 herein, that " * * * this appeal will continue in its normal course and the Court will not act sua sponte * * *," but without prejudice to the consideration of any question of subject matter jurisdiction which it may deem warranted at the time of oral argument; and sufficient reason appearing therefor, it is

FURTHER ORDERED, without objection by the Respondents, that the operation and effect of the Order of this Court dated and entered herein April 28, 1977, by and is hereby stayed in all respects until ten days after the service upon counsel for Appellant of an order determining this application; and it is

FURTHER ORDERED, that service of

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this order to show cause shall be sufficient if made by mail upon Louis J.

Lefkowitz, Attorney General of the State of New York, attention Francis V. Dow, Esq., Assistant Attorney General, Department of Law, Capitol Building, Albany, New York 12224, on or before 6 p.m. o'clock on the 28th day of July, 1977.

Dated: New York, N.Y.

July 26, 1977

S/ Jacob D. Fuchsberg
Judge

(Stamp:)

That service of a copy of this order be made as aforementioned on or before 6 p.m. July 28, 1977, and the original order be filed, with proof of service, immediately after service, in the Office of the Clerk of the Court at Albany by certified mail, return receipt requested.

S/ J.D.F.

E-1

ORDER OF NEW YORK COURT OF APPEALS DENY-
ING MOTION FOR VACATION OF SUA SPONTE
DISMISSAL (3 Mo. No. 880, dated September
9, 1977)

(Captions omitted)

A motion having heretofore been made upon the part of appellant to vacate this Court's order of dismissal dated April 28, 1977 &c., and papers having been submitted thereon, and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

S/ Joseph W. Bellacosa

Joseph W. Bellacosa

Clerk of the Court

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NOTICES OF APPEAL

(Identical Notices of Appeal filed on December 6, 1977, in the New York Court of Appeals (Clerk's File No 601, Index No. 7478-73) and in the Appellate Division, Third Judicial Department, of the New York Supreme Court (Index No. 7478-73))

(Captions omitted)

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that John Lane, Jr., the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York, dated and entered in this proceeding on April 28, 1977, dismissing the appeal then pending before it from the final order of the Appellate Division of the Supreme Court, Third Judicial Department, dated and entered in the office of the Clerk of said Court on the 27th day of October, 1975, confirming

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a determination of the Respondent State Tax Commission of the State of New York, and dismissing the petition in this proceeding.

This appeal is taken pursuant to
28 U.S.C. Sec. 1257(2).

Dated: New York, N.Y.

December 5, 1977

Yours, etc.

JOHN LANE, ESQ.
Attorney for
Petitioner-Appellant
Office & P.O. Address
14 Wall Street
New York, N.Y. 10005
(212-233-7780)

(Addressees shown as Attorneys
for Respondents and the Clerks
of the respective courts)

G-1

LETTER FROM APPELLANT TO PRESIDING JUSTICE
OF APPELLATE DIVISION, 3RD DEPARTMENT,
DATED OCTOBER 1, 1975

Re: Lane v. Gallman, Index No.
7478-3 Argued September 17,
1975, No. 25356

Honorable Sir:

Respondents (brief, p. 10) referred
the Court to "The New York State Personal
Income Tax," by John Chalmers, Ph.D.,
(1948), pp. 30-42.

Nothing therein conflicts with our
view of the law as set forth in Petition-
er's main and reply memoranda. In fact,
the meaning of such words as "non-resi-
dent" and "domicile" as understood in the
years when they were being incorporated
into the statute (see pp. 34 and 35) are
completely in accord with Petitioner's
position.

One of the sources cited by Chalmers
is a symposium of eight articles with an
introduction by Roswell Magill on State

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Income Taxation published in the Iowa Law
Review (Vol. XXII, No. 2, 1937, copy of
which has been made available for the
convenience of the Court). Helpful here
are:

1. "State Jurisdiction to Tax Income,"
by Henry Rottschaefer, Professor of Law,
University of Minnesota (p. 292, espec.
pp. 310-311, and cases cited: Kennedy v.
Com'r. 256 Mass. 426, 152 N.E. 747, 1926,
Greene v. Wisconsin Tax Comm., 266 N.W.
270, Wis., 1936)

[-] The most recent decision on the
same problem as, and in accord with, the
Kennedy case, supra, was the case cited
to the Court on argument: District of
Columbia v. Davis, C.C.A.-D.C. (1967),
371 Fed. 2d 964, cert. denied, 386 U.S.
1034, 87 Sup. Ct. 1487, 18 L. ed. 2d 598_7

2. "Administration of the Personal
Income Tax Law in New York State," by Roy

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H. Palmer, First Assistant Director, New York State Income Tax Bureau (p. 313), espec. "Residence" pp. 322-326.

None of the foregoing mentions the addition of Sec. 367-a (predecessor to Sec. 654) to the Tax Law by Chapter 425 of the Laws of 1922 (copy enclosed). It obviously relates to the subject matter referred to by Rottschaefer (see Item 1, supra).

Respectfully yours,

S/ John Lane

(Copy shown to Attorneys
for Respondents)

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APPENDIX H

FINDINGS OF FACT AND OPINION OF THE DISTRICT OF COLUMBIA TAX COURT (FILED DECEMBER 22, 1965, DOCKET NO. 1969) [Captions omitted]

FINDINGS OF FACT AND OPINION

The assessing authority of the District of Columbia assessed the petitioner a deficiency in income tax from which he here appeals on the grounds (a) that it is statutorily invalid, and (b) that it is unconstitutional. The respondent claims that the assessment was proper.

Findings of Fact

1. The petitioner is a domiciliary of the District of Columbia, residing at 4000 Tunlaw Road, Northwest.
2. (a) Up to and including March 31, 1963, the petitioner was a domiciliary of Michigan, residing in the City of Detroit, and as such he paid an intangible personal property tax to Michigan in the amount of \$26.71, and an income tax to the City of Detroit in the amount of \$45.41, or a total of \$72.12.
(b) During the above three month period the petitioner's income was \$5,142.42.
3. On April 1, 1963, the petitioner came to the District of Columbia and established his residence here, and has since that date been domiciled in the District.
4. The petitioner filed with the assessing authority of the District an income tax return for the period from April 1 to December 31, 1963, in which he reported adjusted gross

not decline to pass on the constitutional question, 16 C. J. S. 319, 320 and 321, *Constitutional Law*, par. 94.

If, as the petitioner claims, the assessment of an income tax on his income earned before he came to the District is invalid, it must be under the due process clause of the Fifth Amendment. *Wright v. Davidson*, 181 U. S. 371, 384, 45 L. Ed. 900, 21 S. Ct. 616, 621; *Moses v. United States*, 16 App. D. C. 428, 434, 50 L. R. A. 532; *Neild v. District of Columbia*, 71 App. D. C. 306, 316, 317, 110 F.2d 246. While the Fourteenth Amendment is not applicable to the District of Columbia,⁷ the Fifth Amendment does so apply.

There can be no question that a state and the District of Columbia can constitutionally impose an income tax on a resident based upon or measured by his entire income, even if part thereof is received or earned without the state or the District. That is so because the state or the District has jurisdiction of the *person* of the taxpayer. It is recognized that a state or the District of Columbia has the constitutional power to impose an income tax when it has jurisdiction of either the person or the income of the taxpayer. But the situation is quite different in respect of income earned when the taxing state or the District has no jurisdiction of either the person or the income. That is the situation here in respect of the income earned by the petitioner before he came to the District. The assessing authority assessed an income tax upon the income earned by the petitioner without the District and while he was neither a resident nor a domiciliary thereof. The Court believes that under the due process clause of the Fifth Amendment such action was without the power of Congress as the legislature for the District to impose the tax; and that since such action was called for in Section 1 of Title VI and Section 1

⁷ The ruling in *Bolling v. Sharpe*, 347 U.S. 497, 98 L. Ed. 881, 74 S. Ct. 693, cited by petitioner, may appear to be contrary, but the ruling was to avoid a constitutional hurdle in a school discrimination case, and apparently was quite limited to such cases. It was held the discrimination was violative of "due process".

of Title X of the District of Columbia Income and Franchise Tax Act of 1947 (Section 47-1567 and 47-1580 of the Code) are violative of the Fifth Amendment in so far as the situation or status of the taxpayer and assessment of the income tax on his income earned from January 1 to March 31, 1963, are concerned.

Since the due process clause of the Fifth Amendment does apply to the District of Columbia, the decisions of the Federal and State Courts involving the due process clause of the Fourteenth Amendment are helpful in the solution of the constitutional question here presented. In *Shaffer v. Carter*, 252 U. S. 37, 64 L. Ed. 445, 48 S. Ct. 221, Mr. Justice Pitney made the observation following:

"And, as far as the question of jurisdiction is concerned, the due process clause of the Fourteenth Amendment imposes no greater restriction in this regard upon the several States than the corresponding clause of the Fifth Amendment imposes upon the United States."

In *New York, Lake Erie & Western R. R. Co. v. Pennsylvania*, 153 U.S. 628, 38 L. Ed. 846, 14 S. Ct. 952, it was held "that the power of the state, even in its power of taxation, in respect to property, is limited to such as is within its jurisdiction." *CF. Wallace v. Hines*, 253 U. S. 66, 64 L. Ed. 782, 40 S. Ct. 435, and *The City of St. Louis v. The Wiggins Perry Co.*, 11 Wallace 423, 20 L. Ed. 192. Also *Green v. Wisconsin Tax Commission*, 221 Wis. 531, 266 N. W. 274; *Martin v. Gage*, 281 Ky. 95, 134 S. W. 966. In the famous case of *State Tax on Foreign-Held Bonds*, 15 Wall. 300, there is found on page 319 this language:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

In respect of, or in connection with the income of the petitioner earned by him without the District of Columbia from January 1 to March 31, 1963, the District did not have jurisdiction of either the person or the income of the petitioner.

There is nothing in *Neild v. District of Columbia*, 71 App. D. C. 306, 110 F. 2d 246, or in *Mercury Press v. District of Columbia*, 84 U. S. App. D. C. 203, 173 F. 2d 636 (cert. den. 337 U. S. 931) that would deny the conclusion drawn herein by the Court. In the first case the taxpayers unsuccessfully invoked the commerce clause, and equal protection clause of the Fourteenth Amendment in a case involving commerce between the District and areas outside and retroactivity. The second mentioned involved the propriety of the taxation by the District of newsprint paper in its original package. The constitutional question here presented, is one of first impression.

While in the *Neild* case it was held that "when it legislates for the District, Congress acts as a legislature of national character", the opinion does state that Congress in legislating for the District is subject to those prohibitions of the Constitution which act directly or by implication upon the Federal Government,⁸ which includes, of course, the due process clause of the Fifth Amendment.

The conclusion of a note, JURISDICTION TO TAX INCOME AS AFFECTED BY CHANGE OF DOMICILE, 35 Harvard Law Review, page 876, after a discussion of the problem, is the following:

"It appears thus that, regardless of the character of the tax its laws impose, the jurisdiction of the state of the new domicile to tax income is limited except in the rare case mentioned⁹ either by the actual lack of jurisdiction or the prohibition on its exercise placed by the Fourteenth Amendment, to

⁸ 71 App. D. C. page 310.

⁹ Not similar to the present case.

the levy of a tax on or with respect to only so much of the total income as was *acquired after acquisition of the new domicile.*" (Emphasis supplied.)

The fact that Section 5 of Title VI of the Income and Franchise Tax Act, Section 47-1567d(a) of the Code, gave a credit against the 1963 District income tax for the income tax paid by the petitioner to his former domicile on the income which he earned from January 1 to March 31, 1963, does not negative or affect the conclusion herein reached. Even if the credit had equaled or exceeded the deficiency, which it did not, the due process clause of the Fifth Amendment did not permit the taxation by the District of income earned in a period during which it had no jurisdiction of either the person or the income of the petitioner.

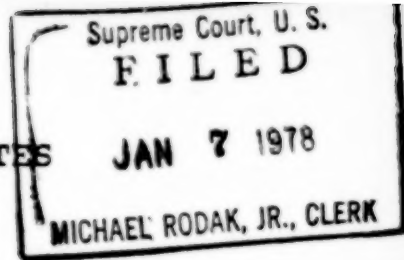
Conclusion

For the reasons stated the Court holds that a deficiency in income tax for the calendar year, 1963, in the amount of \$125.18, was erroneously assessed against, and collected from the petitioner; and that the petitioner is entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from March 15, 1965, to the date of the payment of the refund.

Decision will be entered for petitioner.

s/ Jo. V. Morgan
Jo. V. Morgan
Judge

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977
No. 77-822



In the Matter of the Application of
JOHN LANE, JR.,

Appellant,

for a Judgment Under Article 78 of
the Civil Practice Law and Rules,
etc.

-against-

NORMAN F. GALLMAN, President, et al.,
Constituting the STATE TAX COMMISSION
OF THE STATE OF NEW YORK,

Respondents.

MOTION TO DISMISS OR AFFIRM
ON BEHALF OF RESPONDENTS
STATE TAX COMMISSION OF
THE STATE OF NEW YORK

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IN THE
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-against-

NORMAN F. GALLMAN, President, et al.,
Constituting the STATE TAX COMMISSION
OF THE STATE OF NEW YORK,

Respondents.

MOTION TO DISMISS OR
AFFIRM

This appeal raises the question
whether a substantial constitutional
question was properly raised in the
Court below.

The Nature of the Case

The appellant was domiciled in
New York State throughout 1965. He
resided with his parents in the State
more than 30 days--from January 1,
through February 28, 1965. He had no

2.

permanent place of abode and spent no
time in New York State between March 1,
1965 and December 31, 1965. During this
later period, the appellant maintained
a permanent place of abode outside of
New York State.

On these findings of fact the
respondents issued a final determination
that the appellant was a resident of New
York State for the entire year under the
provisions of New York Tax Law, § 605.
As a result, his income earned outside of
New York State for the period between
March 1, 1965 and December 31, 1965 was
held to be subject to New York State in-
come taxes. The respondent sustained a
tax deficiency in the amount of \$50.75
including interest and the claim for
refund of income tax withheld for 1965
in the amount of \$35.00 was denied.

Thereafter the appellant brought
a proceeding in the nature of certiorari
for judicial review of the determination

of the respondents. The initial judicial disposition of the proceeding was made by the Appellate Division, Third Department of the Supreme Court of the State of New York. Nowhere in the record nor in the briefs in the Appellate Division does it appear that the appellant raised any constitutional question. The Appellate Division, in its decision, after reviewing the determination of the respondents held:

"We cannot say that the Tax Commission's interpretation of these provisions is irrational or unreasonable since it is entirely consistent with prior case law on related topics (Matter of Kritzik v. Gallman, 41 A D 2d 994; People ex rel. Mackall v. Bates, 278 App. Div. 724; Matter of Rothfeld v. Graves, 264 App. Div. 54, affd. 289 N.Y. 583). Accordingly, its construction must be upheld (cf. Matter of Howard v. Wyman, 28 N Y 2d 434, 438)."

The appellant subsequently made a motion in the Appellate Division for reargument or in the alternative for permission to appeal to New York State's highest Court, the Court of Appeals. His motion was denied.

The appellant then made a motion in the Court of Appeals for leave to appeal to that Court. His motion was denied. The appellant filed a notice of appeal to the Court of Appeals. The record and briefs were filed in the Court of Appeals on the appeal. Thereafter on April 28, 1977 the Court of Appeals dismissed the appeal sua sponte upon the grounds that no substantial constitutional question is directly involved.

The appellant, thereafter, made a motion to vacate the sua sponte order of the Court of Appeals dated April 28, 1977. The Court of Appeals denied the

motion. On December 9, 1977, the jurisdictional statement in the Supreme Court of the United States in this matter was received in this office.

Statutes Involved

New York Tax Law, §§ 605 and 654 provide in pertinent part:

"605. Resident and nonresident defined

"(a) Resident individual. A resident individual means an individual:

"(1) who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or

"(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in the armed forces of the United States during an induction period.

"(b) Nonresident individual. A nonresident individual means an individual who is not a resident.

"(c) * * *."

"§ 654. Change of resident status during year

"(a) General. If an individual changes his status during his taxable year from resident to nonresident, or from nonresident to resident, he shall file one return as a resident for the portion of the year during which he is a resident, and one return as a nonresident for the portion of the year during which he is a nonresident, subject to such exceptions as the tax commission may prescribe by regulation.

"(b) * * *."

ARGUMENT

THE APPEAL SHOULD BE
DISMISSED BECAUSE THE
APPELLANT HAS NOT RAISED
A SUBSTANTIAL FEDERAL
QUESTION IN THE COURT BELOW.

In a certain sense every question as to enforcement of a statute involves its constitutionality. The Appellate Division held merely that the definition of "resident" was proper on the facts presented. This is a question of interpretation, not of constitutionality. The Court of Appeals in dismissing the appellant's appeal sua sponte did so on the ground that no substantial constitutional question was presented to it.

It is essential to the exercise of this Court's jurisdiction under 28 U.S.C. § 1257 that a substantial federal question be raised before the highest State court. The remittitur of the Court of Appeals does not show that any constitutional question,

substantial or unsubstantial, was properly presented to it. The respondents in their brief in the New York Court of Appeals argued that the appellant's appeal to that Court could not be taken as of right from a judgment of the Appellate Division which unanimously confirmed a determination of the respondents when no constitutional question was raised in the Appellate Division. The appellant argues that the letter of his attorney to the Appellate Division dated October 1, 1975 raised a constitutional question. It is submitted, however, that the letter merely discusses the words "resident" and "domicile" but did not raise a constitutional question, nor did the respondents raise a constitutional question in the Appellate Division. The respondents in their brief in the Appellate Division merely

stated that the United States Supreme Court has upheld the right of the State to tax a person domiciled therein on income derived from outside sources.

This Court, it is submitted, should dismiss the appeal because of want of jurisdiction. See, Lanza v. New York, 370 U. S. 139, 142, n. 6 (1962); Ungar v. Sarafite, 376 U. S. 575, 582-583 (1964); Willner v. Committee on Character, 373 U. S. 96, 104 (1963).

It is submitted that domicile within a state is a valid basis for the imposition of an income tax by states. This Court in Miller Bros. Co. v. Maryland, 347 U. S. 340 (1954), citing Maguire v. Trefry, 253 U. S. 12; Lawrence v. State Tax Comm'n, 286 U. S. 276; New York ex rel. Cohn v. Graves, 300 U. S. 308; Guaranty Trust Co. v. Virginia, 305 U. S. 19, said at page 345:

"Thus, the Court has frequently held that domicile or residence, more substantial than mere presence in transit or sojourn, is an adequate basis for taxation, including income, property and death taxes."

The definition of "resident" in the New York Tax Law, therefore, does not present a constitutional question since it includes more than domicile alone.

CONCLUSION

THE APPEAL SHOULD BE
DISMISSED.

Dated: January 4, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents

RUTH KESSLER TOCH
Solicitor General
of the State of New York

FRANCIS V. DOW
Assistant Attorney General
of the State of New York

of Counsel

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

JOHN LANE, JR.

for a Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law
for the Year 1965.

John Lane, Jr. filed a petition under section 639 of the Tax Law for the redetermination of a deficiency and for refunds in personal income tax under Article 22 of the Tax Law for the year 1965. In lieu of a hearing, the petitioner, without counsel, and the Income Tax Bureau, by Edward H. Best, Esq. (Francis X. Boylan, Esq., of Counsel), have submitted the file pertaining to the deficiency to the State Tax Commission. Said file has been duly examined and considered.

ISSUE

The issue in this case is whether a domiciliary of this State who changed his abode during 1965 is a resident for the entire year or whether he can be considered a nonresident for part of the year under section 603 of the Tax Law, and thus entitled to file a nonresident return for part of the year under section 634 of the Tax Law.

FINDINGS OF FACT

1. Petitioner was, during 1965 and prior years, a domiciliary of New York State.

2. Until March 1, 1963, petitioner resided with his parents in Yonkers, New York. He finished law school in June, 1964, and worked for a New York City law firm until February, 1965. He applied for a direct commission into the Air Force Reserve and received a commission in January, 1965.

3. On March 1, 1963, petitioner reported to his duty station at the office of the General Counsel, United States Air Force, Pentagon Building, Washington, D.C. From March until November, 1963 he rented an apartment in Arlington, Virginia under a six month lease. He then moved to another rented apartment in Alexandria, Virginia which he held under a yearly lease and which he kept until 1967. Both apartments were chosen so as to be suitable after petitioner's planned marriage in September, 1963.

4. Petitioner spent more than 30 days in New York State between January 1, 1963, and February 23, 1963. He spent no time in New York State between March 1, 1963, and December 31, 1963.

5. The deficiency amounts to \$50.75 including interest. The refund claimed is for withholding tax in the amount of \$35.20.

CONCLUSIONS OF LAW

Petitioner was a New York resident, as defined in section 603 of the Tax Law, for the entire year 1965 and was not entitled to file a return for part of 1965 under section 634 of the Tax Law as a nonresident. Petitioner did not change his domicile during 1965. Furthermore, he remained a New York resident since he had no place of abode outside of New York for the entire year 1965, and he did maintain a place of abode in New York for

BEST COPY AVAILABLE

part of such year. We must reject petitioner's argument that he satisfied the conditions of section 605(a)(1) when only the latter part of 1963 is considered and that therefore he should be considered a nonresident for that part of the year. The acquisition of a new place of abode or the abandonment of an old place of abode during a taxable year does not cause a change in residence during such taxable year.

The provisions defining residence in terms of permanent place of abode were added to the income tax law (see section 350 subdivision 7 of Article 16 of the Tax Law, the predecessor of section 605) by Chapter 425 of the Laws of 1922 to affect only those individuals who continuously from year to year claim a domicile in one state but actually maintain a home in another state with some degree of permanence. These provisions have been interpreted to mean that the requisite permanent place of abode must exist for the entire taxable year.

The further provisions added by chapter 462 of the Laws of 1934 relating to New York domiciliaries and imposing the dual requirement that a domiciliary maintain no permanent place of abode in New York and maintain a permanent place of abode outside of New York have been interpreted to impose two separate requirements relating to a permanent place of abode each of which must be met for the entire taxable year in question and neither of which has been met by this petitioner. The provisions of section 654 of the Tax Law relating to two returns thus apply only where there is a change in residence by reason of a change of domicile during the taxable year. These provisions have never been held to apply where there is only an acquisition or abandonment of a place of abode even though they were added to the predecessor of section 654 (section 367-a of Article 16 of the Tax Law) by the same law (chapter 425 of the Laws of 1922), that de-

finer residence in terms of a permanent place of abode. This construction of the law has been upheld by the courts in *People ex rel. Mackell v. Bates*, 273 App. Div. 724.

DECISION

The petition is denied. The refunds are denied. The deficiencies are affirmed together with such interest, if any, as may be due under section 684 of the Tax Law.

Dated: Albany, New York, March 16, 1972.

STATE TAX COMMISSION

/s/ NORMAN F. GALLMAN
Commissioner

/s/ A. BRUCE MANLEY
Commissioner

/s/ MILTON KORNBERG
Commissioner

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LETTER FROM APPELLANT TO PRESIDING JUSTICE
OF APPELLATE DIVISION, 3RD DEPARTMENT,
DATED OCTOBER 1, 1975

Re: Lane v. Gallman, Index No.
7478-3 Argued September 17,
1975. No. 25356

Honorable Sir:

Respondents (brief, p. 10) referred
the Court to "The New York State Personal
Income Tax," by John Chalmers, Ph.D.,
(1948), pp. 30-42.

Nothing therein conflicts with our
view of the law as set forth in Petition-
er's main and reply memoranda. In fact,
the meaning of such words as "non-resi-
dent" and "domicile" as understood in the
years when they were being incorporated
into the statute (see pp. 34 and 35) are
completely in accord with Petitioner's
position.

One of the sources cited by Chalmers
is a symposium of eight articles with an
introduction by Roswell Magill on State

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Income Taxation published in the Iowa Law
Review (Vol. XXII, No. 2, 1937, copy of
which has been made available for the
convenience of the Court). Helpful here
are:

1. "State Jurisdiction to Tax Income,"
by Henry Rottschaefer, Professor of Law,
University of Minnesota (p. 292, espec.
pp. 310-311, and cases cited: Kennedy v.
Com'r. 256 Mass. 426, 152 N.E. 747, 1926,
Greene v. Wisconsin Tax Comm., 266 N.W.
270, Wis., 1936)

[The most recent decision on the
same problem as, and in accord with, the
Kennedy case, supra, was the case cited
to the Court on argument: District of
Columbia v. Davis, C.C.A.-D.C. (1967),
371 Fed. 2d 964, cert. denied, 386 U.S.
1034, 87 Sup. Ct. 1487, 18 L. ed. 2d 598.]

2. "Administration of the Personal
Income Tax Law in New York State," by Roy

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H. Palmer, First Assistant Director, New York State Income Tax Bureau (p. 313), espec. "Residence" pp. 322-326.

None of the foregoing mentions the addition of Sec. 367-a (predecessor to Sec. 654) to the Tax Law by Chapter 425 of the Laws of 1922 (copy enclosed). It obviously relates to the subject matter referred to by Rottschaefer (see Item 1, supra).

Respectfully yours,

S/ John Lane

Supreme Court—Appellate Division
City and County of New York

M. Lane A-8

APPENDIX C

October 23, 1975.

25356

In the Matter of JOHN LANE, JR., Petitioner,
v.
NORMAN F. GALLMAN et al., Constituting the
State Tax Commission, Respondents.

Proceeding pursuant to CPLR article 78 (transferred to this court by order of the Supreme Court at Special Term, entered in Albany County) to review a determination of the State Tax Commission which denied petitioner's application for a redetermination of a deficiency and for a refund in personal income tax for the year 1965.

Individuals subject to the New York personal income tax are classified as either residents or non-residents as those terms are defined by section 605 of the Tax Law. Section 654 of the Tax Law governs those situations in which an individual's status as a resident or a non-resident changes during his taxable year. Claiming that his former resident status had changed during 1965, petitioner invoked section 654 and computed his tax liability for that year under its provisions. The Tax Commission disagreed, determining that a higher tax amount was due from him as a resident, and this proceeding ensued when petitioner's application for a redetermination of a deficiency and claim for a refund was denied.

The facts are undisputed. Petitioner remained a New York domiciliary throughout the tax year in question although he left his former permanent abode in Yonkers on March 1, 1965 when he entered military service. For the balance of that year he maintained a permanent abode at different locations in the State of Virginia and did not return to New York. Sometime after 1965 he abandoned his domicile in this jurisdiction.

Insofar as it relates to this case, a resident individual is defined as one " * * * who is domiciled in this state, unless he maintains no permanent place of abode in this state maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state" (Tax Law, § 605, subd. [a], par. [1]). Petitioner insists that since he met the conditions of exception after March 1, 1965, his status had changed to that of a non-resident during the tax year. The Tax Commission, on the other hand, interprets the conditions of exception as applying to an entire taxable year and concludes that, when so measured, petitioner failed to remove himself from the resident classification during 1965 because he maintained a permanent abode and spent more than 30 days in this

APPENDIX C

Supreme Court—Appellate Division
Third Judicial Department

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25356

State. Under this construction, as petitioner correctly observes, it would be impossible for him to effect a change in his resident status during any taxable year without making a corresponding change in his domicile. However, merely because section 654 of the Tax Law contains a procedure to be followed when a change in status occurs during a tax year, it does not necessarily follow that such a change is thereby authorized or made possible in every circumstance. We cannot say that the Tax Commission's interpretation of these provisions is irrational or unreasonable since it is entirely consistent with prior case law on related topics (Matter of Kritzik v. Gallman, 41 A D 2d 994; People ex rel. Mackall v. Bates, 278 App. Div. 724; Matter of Rothfeld v. Graves, 264 App. Div. 34, *affd.* 209 N.Y. 583). Accordingly, its construction must be upheld (cf. Matter of Howard v. Wyman, 28 N Y 2d 434, 438).

Determination confirmed, and petition dismissed, without costs.

SWEENEY, J. P., KANE, KOREMAN, MAIN and LARKIN, JJ., concur.

Supreme Court—Appellate Division
Third Judicial Department

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January 7, 1976

25356 - In the Matter of JOHN LANE, JR., Petitioner,
v.
NORMAN F. GALLMAN et al., Constituting the
State Tax Commission, Respondents.

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals, denied, without costs.

KOREMAN, P. J., SWEENEY, KANE, MAIN and LARKIN, JJ., concur.

State of New York,
Court of Appeals

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APPENDIX D

*At a session of the Court, held at Court of
Appeals Hall in the City of Albany
on the twenty-fifth day
of March A. D. 1976*

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

3 No. No. 228 -
In the Matter of
the Application of John Lane,
Jr., Appellant,
For a Judgment Ac.
vs.
Norman F. Gallman, President,
&ors., constituting the State
Tax Commission, Respondents.

A motion for leave to appeal to the Court of Appeals
in the above cause having heretofore been made upon the part of
the appellant herein and papers having been submitted thereon
and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby
is denied.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

State of New York,
Court of Appeals

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*At a session of the Court, held at Court of
Appeals Hall in the City of Albany
on the twenty-eighth day
of April A. D. 1977*

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

3 No. No. 424 SSD 39
In the Matter of
the Application of John Lane,
Jr., Appellant,
For a Judgment Ac.
vs.
Norman F. Gallman, President,
&ors., constituting the State
Tax Commission, Respondents.

The appellant having filed notice of appeal in the above
title and due consideration having been thereupon had, it is
ORDERED, that the appeal be and the same hereby is
dismissed without costs, by the Court sua sponte, upon the ground
that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

State of New York,
Court of Appeals

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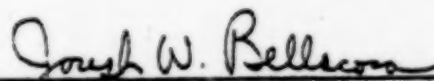
At a session of the Court, held at Court of
Appeals Hall in the City of Albany
on the _____ ninth _____ day
of _____ September _____ A. D. 1977

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

3 No. No. 880
In the Matter of
the Application of John Lane,
Jr., Appellant,
For a Judgment &c.
vs.
Norman F. Callman, President,
&c., constituting the State
Tax Commission, Respondents.

A motion having heretofore been made upon the part
of appellant to vacate this Court's order of dismissal dated
April 28, 1977 &c. and papers having been submitted thereon and
due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same
hereby is denied.


Joseph W. Bellacosa
Clerk of the Court

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD JUDICIAL DEPARTMENT

----- x
In the Matter of the Application of :
JOHN LANE, JR., :

Petitioner, :

Index No. 7478-73

For a Judgment under Article 78 of the :
Civil Practice Law and Rules Reversing :
a Determination of the State Tax Com- :
mission and Granting Petitioner's :
Application for a Redetermination of :
Deficiency and for a Refund of Personal :
Income Tax under Article 22 of the Tax :
Law for the Year 1965, :

-against- :

NORMAN F. GALLMAN, President, A. BRUCE :
MANLEY and MILTON KOERNER, constituting :
the STATE TAX COMMISSION OF THE STATE :
OF NEW YORK, :

Respondents. :

----- x
NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that John Lane, Jr., the
Appellant above named, hereby appeals to the Supreme Court of
the United States from the final order of the Court of Appeals
of the State of New York, dated and entered in this proceeding
on April 28, 1977, dismissing the appeal then pending before it.

from the final order of the Appellate Division of the Supreme Court, Third Judicial Department, dated and entered in the office of the Clerk of said Court on the 27th day of October, 1975, confirming a determination of the Respondent State Tax Commission of the State of New York, and dismissing the petition in this proceeding.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: New York, N.Y.

December 5, 1977

John Lane
Yours, etc.
JOHN LANE, ESQ.
Attorney for
Petitioner-Appellant
Office & P.O. Address
14 Wall Street
New York, N.Y. 10005
(212) 233-7780

TO: LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the
State of New York
Attorney for Respondents
Francis V. Dow, Esq.
Assistant Attorney General
Law Department, Capitol Building
Albany, New York 12224
(518) 474-7764

Honorable Clerk of the Court
Supreme Court of the State of New York
Appellate Division, Third Judicial Department
Justice Building, Empire State Plaza
Albany, New York 12223

FEB 4 1978

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1977

No. 77-822

In the Matter of the Application of
JOHN LANE, JR.,
Appellant,
for a Judgment Under Article 78 of
the Civil Practice Law and Rules, etc.

v.

NORMAN F. GALLMAN, President, et al.,
constituting the STATE TAX COMMISSION OF
THE STATE OF NEW YORK,
Respondents

On Appeal From the Court of Appeals
of the State of New York

APPELLANT'S BRIEF IN OPPOSITION
TO MOTION TO DISMISS OR AFFIRM

FEBRUARY 1978

JOHN LANE
14 Wall Street
New York, N.Y. 10005
Tel.: 212-233-7780
JOHN LANE, JR.
Attorneys for Appellant

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-822

In the Matter of the Application of
JOHN LANE, JR. Appellant,
for a Judgment Under Article 78 of
the Civil Practice Law and Rules, etc.

v.

NORMAN F. GALLMAN, President, et al.,
constituting the STATE TAX COMMISSION OF
THE STATE OF NEW YORK, Respondents

On Appeal From the Court of Appeals
of the State of New York

APPELLANT'S BRIEF IN OPPOSITION
TO MOTION TO DISMISS OR AFFIRM

This case challenges New York
State's jurisdiction to tax appellant on
out-of-state income earned during the
balance of the year appellant permanently
left the state.

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I. Respondents Misstate the Issue

Respondents open their statement of
the case by misstating, as though uncon-
tested, that "[t]he Appellant was domi-
ciled in New York State throughout 1965."
(p. 1 of Motion) That, however, is pre-
cisely the main issue on the merits of
this case--i.e., whether the New York Tax
Law may constitutionally tax as domicil-
ed and therefore resident in New York
throughout 1965 a person like appellant
who permanently left New York on March 1,
1965, thereafter neither retaining nor
ever again maintaining any place of abode
in New York nor enjoying any benefits in
New York.

Respondents close their Motion with
the argument, as though contested, that
"domicile within a state is a valid basis
for the imposition of an income tax by
states. [with citations]" (pp. 9-10 of

Motion) Not only is that not in issue, however, but appellant himself relies on this same fundamental principle of state tax jurisdiction (with the term "domicile" properly understood) and on the precise line of authority respondents cite. (See pp. 24-25 of Jurisdictional Statement)

Thus respondents attempt to misdirect the Court's attention from the main, truly substantial constitutional issue to a nonissue which is not substantial and indeed does not even exist.

II. Respondents Erroneously Assert Lack of Jurisdiction for Failure To Raise the Constitutional Issues Timely
Below (p. 3 of Motion)

Respondents' attack on jurisdiction for untimely assertion of unconstitutionality fails on three counts.

A. Unconstitutionality Was Timely Asserted Before the First Lower-Court Decision (the Appellate Division's)

See pages 17-19 of Jurisdictional

Statement, uncontested by respondents.

(1) They themselves introduced constitutionality of the tax in their brief to the Appellate Division; (2) upon oral argument appellant informed that court in substance of the main constitutional issue (citing as authoritative District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir.), cert. denied, 386 U.S. 1034 (1967)), which presented on indistinguishable facts the identical Due Process question as this case); and (3) appellant's post-argument letter (App. G to Jurisdictional Statement) (i) discussed the Tax Law definitions of "resident" and "domicile" (which have inherent constitutional significance), (ii) confirmed the oral argument reference to Davis, and (iii) cited several other authorities directly involving constitutionality of state taxation of income earned before entering or after

leaving the state.

B. Unconstitutionality Was Timely
Asserted on Motion for Reargument
After Appellate Division's Un-
expected Construction of the Tax
Law

The Appellate Division's construction of the Tax Law against appellant was directly contrary to its own precedent--the only one in the New York courts--in Kritzik v. Gallman, 41 App. Div. 2d 994, 344 N.Y.S.2d 107 (1973). (See pp. 29-31 of Jurisdictional Statement.) Thus it was unexpected.

The affidavit of the undersigned in support of appellant's Motion for Reargument or Leave to Appeal to Court of Appeals, filed in the Appellate Division, more fully discussed the Due Process issue. (See excerpts set forth in Appendix I, infra.) Moreover, appellant's brief in the Court of Appeals presented both the Due Process and the Equal Pro-

tection issues squarely and extensively. (See Argument headings set forth in Appendix J, infra.)

If the pre-decision presentation of the issues (see A above) is deemed insufficient, the subsequent, more extensive presentations certainly sufficed, and were timely because of the unexpected nature of the Appellate Division's decision. Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 367 (1932); Herndon v. Georgia, 295 U.S. 441, 443-44, 447 (1935); International Steel & Iron Co. v. National Surety Co., 297 U.S. 657, 665 (1936).

C. Constitutional Issues Were in
Fact Decided by the Court of Ap-
peals, Precluding Inquiry into
Timeliness of Assertion

It is uncontested that appellant briefed at length in the Court of Appeals the same constitutional issues here pre-

sented. (Compare pp. 23-32 of Jurisdictional Statement with Argument headings set forth in Appendix J, infra.)

Refusal to recognize existence of a substantial constitutional issue on the merits is effectively a decision thereon. Lawrence v. State Tax Commission, 286 U.S. 276, 282-83 (1932). Hence the Court of Appeals' dismissal "upon the ground that no substantial constitutional issue is directly involved" (see App. C of Jurisdictional Statement) constituted a rejection on the merits of appellant's constitutional attack upon the New York Tax Law and upon the Appellate Division's denial of equal protection. This precludes inquiry into timeliness of assertion of the issues in the lower state courts. Whyy, Inc. v. Borough of Glassboro, 393 U.S. 117, 119 (1968); Charleston Federal Savings & Loan Association v. Alderson, 324

U.S. 182, 185-86 (1945).

The remittitur (not before this Court and totally unknown to appellant) and the remittitur cases cited by respondents (p. 9 of Motion) are irrelevant because appellant has otherwise shown that the constitutionality of a state statute was drawn in question and resolved affirmatively. If a clearer showing is required, however, appellant requests leave to seek amendment of the remittitur or issuance of a certificate by the Court of Appeals, or remand conditional upon issuance thereof. Cf. Lynum v. Illinois, 368 U.S. 908 (1961).

CONCLUSION

This Court should reverse or vacate and remand to the New York Court of Appeals for adequate consideration of the serious constitutional issues of this case in light of United States v. Jin

Fuey Moy, 241 U.S. 394, 401,(1961), which requires construction of a statute to avoid grave constitutional questions. District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir), cert. denied, 386 U.S. 1034 (1967), applied that doctrine to indistinguishable facts and is controlling here.

If remand is inappropriate, then the Court should note probable jurisdiction and proceed to hear and decide the merits.

RESPECTFULLY SUBMITTED,

JOHN LANE
JOHN LANE, JR.

Attorneys for Appellant

February, 1978

APPENDIX

EXCERPTS FROM AFFIDAVIT OF JOHN LANE IN SUPPORT OF APPELLANT'S NOTICE OF MOTION FOR REARGUMENT OR LEAVE TO APPEAL TO COURT OF APPEALS, FILED IN APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE NEW YORK SUPREME COURT, DATED DECEMBER 1, 1975 (Index No. 7478-73)

(Captions omitted)

* * *

STATE PUBLIC POLICY WITH RESPECT TO THE QUESTION OF CONSTITUTIONAL JURISDICTION TO TAX

AND

A JUDICIAL POLICY IN RESPECT OF ALL KINDS OF POSSIBLE CONSTITUTIONAL PROBLEMS

In light of the Legislative Committee Reports (Exhibits B and D annexed hereto) recommending the two amendments of 1922 and the amendment of 1934, there is no escaping the fact that these amendments manifest a public policy of the State of New York to tax every person as a resident or a nonresident strictly in accordance with the periods when he was or was not actually a resident of New York, out of a sense of justice, as well

as to avoid constitutional problems.

* * *

The Lawrence case, the leading case on the subject, dealt with income earned by an [actual] resident of Mississippi, but from the construction of highways outside the state. The Supreme Court upheld the Mississippi income tax thereon as a tax on a person "domiciled" in Mississippi, but the constitutional justification was placed on the enjoyment of the benefits and privileges derived from [actual] residence in the state.

In an analysis of this case in 1937 it was said:

"The basic assumption of the opinion is that responsibility for sharing the costs of government is inseparable from the enjoyment of the privileges of residence within a state and the concomitant right to invoke the protection of its laws. Hence, domicile itself is affirmed to constitute a basis for taxation. The Federal Constitution is said

to leave a state unrestricted in its power to tax those domiciled within it so long as the tax is imposed on property within the state or on privileges enjoyed therein and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment. * * * (Henry Rottschaefer, Professor of Law, University of Minnesota, "State Jurisdiction to Tax Income," Iowa Law Review, Vol. XX, No. 2, January 1937, page 305)

The clear import not only of the Lawrence case but of the law generally in this area is that the concept of domicile imports actual residence and that naked domicile will not sustain a tax on income earned outside the state. It seems clear beyond peradventure that the Court would not sustain a tax on income earned outside the state on the basis of the somewhat ephemeral type of "domicile" of one who, like the Petitioner herein, maintained no place of abode whatever within the state and was not actually

resident therein at any time during the taxable period involved.

It was this concept of the limitations on a state constitutional jurisdiction to impose an income tax, foreshadowed over a period of years, which was responsible for the New York statute of 1922 including the dual returns provision of §367-a (now §654(a)).

* * *

In both cases [domicile and nondomicile], actual residence is essential to sustain the tax. Sec. 654(a) simply gives effect to this constitutional requirement for a domiciliary in the year of change of residence, as this Court did for Kritzik (Kritzik v. Gallman, 41 App.Div.2d 994, [1973]), under the "seven-month's" rule.

* * *

Nor did the Petitioner here meet the requirement for taxation as a resident when he no longer had a permanent place of abode in New York to give substance to furnish a constitutional basis for taxation as a resident which his disembodied "domicile" lacked after April [sic: March] 1, 1965.

STATUTORY CONSTRUCTION WHERE POSSIBLE
CONSTITUTIONAL INFIRMITY IS PRESENT

Upon the argument herein, counsel referred the Court to the holding in District of Columbia, Petitioner, v. Davis, Respondent, C.C.A.-D.C. 1/5/67, 371 Fed.2d 964, cert. denied 386 U.S. 1034, 87 Sup.Ct. 1487, 18 L.ed. 2d 598. In issue there was the constitutional question eliminated in New York by the split-year statute (§654(a)), namely, income tax unsupported by actual residence.

* * *

[The respondents' construction] involves what has since the inception of state income taxes been regarded as a substantial question under the Federal Constitution.

ARGUMENT HEADINGS FROM BRIEF FOR PETITIONER-APPELLANT IN THE NEW YORK COURT OF APPEALS (Index No. 7478-73)

(Captions omitted)

Argument

- I. The State Does Not Have Jurisdiction to Tax The Out-of-State Income of a New York Domiciliary for a Period After He Has Permanently Left The State, Retaining Only a Naked Domicile. Attempted Exercise of Such Jurisdiction Would Violate the Fourteenth Amendment to the U.S. Constitution
- A. Constitutional Criteria for Income Tax Jurisdiction
- B. Precedents Recognizing Serious Constitutional Issue Regarding Pre-Residence or Post-Residence Out-of-State Income
- C. Application of Precedents to Facts of This Case

- II. The Court Can and Should Avoid Reaching the Serious Constitutional Issue of Jurisdiction, By Construing the Tax Law As Not Attempting To Impose the Tax in Question
- A. The Tax Law Must Be Construed, If Fairly Possible, So As To Avoid the Serious Doubt As To Its Constitutionality -- i.e., So As Not To Tax Appellant on Income Earned Out-of-State After March 1, 1965
- B. It Is Fairly Possible In This Case To Construe the Tax Law So As To Avoid the Serious Doubt As To Its Constitutionality -- i.e., So As Not to Tax Appellant On Income Earned Out of State After March 1, 1965
1. Statute on Its Face
2. The Kritzik Case